No. 84-1017

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IN THE

Supreme Court of the United States

October Term, 1984

UNIVERSITY OF PITTSBURGH, WESLEY W. POSVAR, PAUL N. ROBINSON, RHOTEN A. SMITH, DONALD N. HENDERSON and ROBERT NOSSEN,

Petitioners,

vs.

HARRY T. KRYNICKY, JR.,

Respondent.

TEMPLE UNIVERSITY,

Petitioner,

vs.

ROSEMARY SCHIER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION

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18 pp

Statement of the Question Presented

Whether the Court Of Appeals For The Third Circuit correctly held that universities integrated by statute into the state's higher education system and designated as "instrumentalities" of the state are state actors within the meaning of 42 U.S.C. §1983 and the Fourteenth Amendment?

TABLE OF CONTENTS.

	Page
Statement of the Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	2
Reasons for Denying the Writ	4
A. The Court Of Appeals Applied Well Established Law To Determine The Existence Of "State Action"	4
B. The Court Of Appeals' Decision Presents No Conflict With Holdings Of Other Courts	6
1. Cases Involving Other Universities	6
2. Cases Involving Other Statutory Schemes	8
3. Cases Discussing Whether The State Derived Profits From The Challenged Private Activity	9
4. Cases Involving State Subsidy And Regulation	11
Conclusion	12
Certificate of Service	13

Page

TABLE OF AUTHORITIES.

CASES:

Arlosoroff v. National Collegiate Athletic Association, 746 F.2d 1019 (4th Cir. 1984) 11
Blouin v. Loyola University, 506 F.2d 20 (5th Cir. 1975) 6
Blum v. Yaretsky, 457 U.S. 991 (1982) 5,9
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 4,5,8,9,11
Gerena v. Puerto Rico Legal Services, Inc., 697 F.2d 447 (1st Cir. 1983) 9
Gilinsky v. Columbia University, 488 F.Supp. 1309 (1980), *aff'd*, 652 F.2d 53 (2d Cir. 1981) 7
Gomez v. North Dakota Rural Development Corp., 704 F.2d 1056 (8th Cir. 1983) 9,10
Greene v. Johns Hopkins University, 469 F.Supp. 187 (D.Md. 1979) 7
Hicks v. Southern Maryland Health Systems Agency, 737 F.2d 399 (4th Cir. 1984) 9
Krynicky v. University of Pittsburgh, 742 F.2d 94 (3d Cir. 1984) 2,4,5,10,11
Loh-Seng Yo v. Cibola General Hospital, 706 F.2d 306 (10th Cir. 1983) 11
Lorentzen v. Boston College, 440 F.Supp. 464 (D.Mass. 1977), *aff'd*, 577 F.2d 720 (1st Cir. 1981), *cert. denied*, 440 U.S. 924 (1979) 7
Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982) 5,8
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) .. 5
Murphy v. Villanova University, 547 F.Supp. 512 (E.D.Pa. 1982), *aff'd*, 707 F.2d 1402 (3d Cir. 1983) 6,7
Rendell-Baker v. Kohn, 457 U.S. 830 (1982) 5

Page

Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982) 6
Stewart v. New York University, 430 F.Supp. 1305 (S.D.N.Y. 1976) 7
Weise v. Syracuse University, 522 F.2d 397 (2d Cir. 1975) 6

STATUTES:

Communications Satellite System Act, Pub.L. 87-624, Title III, §301, Aug. 31, 1962, 76 Stat. 423 .. 8
Temple University-Commonwealth Act of November 30, 1965, P.L. 843, Pa. Stat. Ann. Tit. 24, §2510-2, *et seq.*; University of Pittsburgh-Commonwealth Act of July 28, 1966, P.L. 87, Pa. Stat. Ann. Tit. 24, §2510-202, *et seq.* 2,3,7,8,10
National Rail Passenger Service Act, Pub.L. 95-421, §11, Oct. 5, 1978, 92 Stat. 928, Pub.L. 97-35, Title XI, §1188(a), Aug. 13, 1981, 95 Stat. 699 9
Rutgers, the state university law, 18 A:65-1 *et seq.* .. 6
42 U.S.C. §1983 ..... i,2,4,8

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RESPONDENTS' BRIEF IN OPPOSITION

Statement of the Case

Two of the Pennsylvania state-related universities, The University of Pittsburgh-Of the Commonwealth System of Higher Education ["Pitt"], and Temple University-Of the Commonwealth System of Higher Education ["Temple"] [hereafter "the Universities"], are seeking review of the decision of the Court of Appeals for the Third Circuit which held that, in light of Pennsylvania's statutory scheme which incorporated Pitt and Temple into the state system of higher education, the Universities are state actors for purposes of 42 U.S.C. §1983.[1] The Court of Appeals' opinion is reported in *Krynicky v. University of Pittsburgh*, 742 F.2d 94 (3d Cir. 1984).

The Universities erroneously argue that this case involves a finding of state action by two purely private institutions "which receive some state aid" (Petition pp. 1, 2) despite the clear statement by the Court of Appeals that the basis of its decision was not the substantial state aid which the Universities received[2] but rather the unusual total statutory intermingling of the state and the formerly private Universities. *Krynicky*, 742 F.2d at 101-103.

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[1] Temple University-Commonwealth Act of November 30, 1965, P.L. 843, Pa. Stat. Ann. Tit. 24, §2510-2; University of Pittsburgh-Commonwealth Act of July 28, 1966, P.L. 87, Pa. Stat. Ann. Tit. 24, §2510-202. As the Court of Appeals in *Krynicky* noted these two statutes are "virtually identical", 742 F.2d at 99.

[2] For example, for the fiscal year July, 1982 through June, 1983, the General Assembly appropriated $78,235,000 to the University of Pittsburgh. 742 F.2d at 102.

The Temple University-Commonwealth Act in recognizing the University as "state-related" and in designating Temple as an "instrumentality" of the state provides:

> That the Commonwealth of Pennsylvania recognizes Temple University *as an integral part of a system of higher education in Pennsylvania*, and that it is desirable and in the public interest to perpetuate and extend the relationship between the Commonwealth of Pennsylvania and Temple University for the purpose of improving and strengthening higher education by designating Temple University as a State-related university;
>
> Therefore, it is hereby declared to be the purpose of this act to extend Commonwealth opportunities for higher education by establishing Temple University *as an instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth system of higher education.* (Emphasis added) Pa. Stat. Ann. Tit. 24, §2510-2.

The statutory language with respect to Pitt is identical, Pa. Stat. Ann. Tit. 24, §2510-202.

This Brief will address the reasons why under Rule 17 this Court should decline to review the Court of Appeals' application of well-settled law concerning the determination of state action in those institutions which are included within Pennsylvania's unique statutory scheme designating certain universities as "state-related" and state "instrumentalities".

REASONS FOR DENYING THE WRIT

A. The Court Of Appeals Applied Well Established Law To Determine The Existence Of "State Action".

The standard for determining the existence of "State action" has been established by this Court in a number of opinions and was properly applied by the Court of Appeals in this case.

That standard as set forth by the Universities in their Petition is as follows:

> "The 'ultimate issue' in determining whether state action exists is whether the alleged infringement of federal rights is 'jointly attributable to the State.' *Lugar*, 457 U.S. at 937" (Petition p. 10).

This is precisely the same legal standard applied by the Court of Appeals in its determination that the Universities were state actors for purposes of §1983:

> "The fifth and fourteenth amendments protect individuals only from governmental action. In order for Krynicky or Schier to benefit from these constitutional protections, they must show that the alleged violations of due process and freedom of speech are 'fairly attributable to the state.' *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982)." 742 F.2d at 97.

The Universities are simply dissatisfied with the Court of Appeals' application of this Court's prior state action decisions to the particular facts in this case.

Because this Court has consistently recognized the continuing viability of the symbiotic relationship test for state action established in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the Universities without

any attempt to analyze *Burton* have stated that it has no "precedential value" to this case (Petition, p. 14, n. 7). With reference to the continuing viability of *Burton*, in *Lugar vs. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982) this Court noted that in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), *Burton* was distinguished, 457 U.S. at 938, n. 19. In *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) this Court explicitly found no symbiotic relationship, *Id.* at 842 (1982). Finally, in *Blum v. Yaretsky*, 457 U.S. 991 (1982) this Court indicated that funding and regulation alone do not give rise to *Burton* liability. *Id.* at 1011. The holding and rationale of *Burton* therefore remains intact.

Petitioners also claim that the Court of Appeals "declined to acknowledge the impact of *Blum*, *Rendell-Baker* and *Polk County* [454 U.S. 312 (1981)] on its state action analysis" (Petition p. 14). To the contrary after consideration of the unusual statutory entwinement of the Commonwealth and the Universities, the Court of Appeals determined that the state action fact pattern most analogous to the facts presented was in *Burton*:

> "The Commonwealth's interrelationship with Pitt and Temple in these cases is more closely analogous to the complete interminging of state private actions found in *Burton* than to the relatively minimal interrelationship between the State and the defendants in *Blum* and *Rendell-Baker*." 742 F.2d at 101.

Thus, there is no conflict as alleged by the Universities, between the law as established by this Court and the law applied by the Court of Appeals.

B. The Court Of Appeals' Decision Presents No Conflict With Holdings Of Other Courts.

Contrary to the assertion of the Universities (Petition at pp. 7-8) the decision of the Court of Appeals for the Third Circuit is consistent with the decisions of other Courts of Appeals. There is no conflict on the actual issue presented here. The Universities' reliance on cases involving other universities, other statutory schemes, and private entities which are merely subsidized or regulated are misplaced. Those cases are clearly distinguishable on their facts from the state related university scheme reviewed by the Court of Appeals in this case.

1. Cases Involving Other Universities.

The decision below rested on the Court's careful analysis of the Pennsylvania statutory scheme for the State-related Universities. The Universities have not identified and the Plaintiff-Respondents are unaware of any similar state higher education system in the United States. The closest analogy may be the designation of a formerly private institution Rutgers University as the State University of New Jersey. See Rutgers, the state university law, 18 A:65-1 *et seq.*

All of the cases cited by the Universities in their Petition at p. 8 involved purely private institutions which were not incorporated into their states' higher education system by any statutory scheme. See *Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); *Weise v. Syracuse University*, 522 F.2d 397 (2d Cir. 1975); *Blouin v. Loyola University*, 506 F.2d 20 (5th Cir. 1975); *Murphy v. Villanova University*, 547 F.Supp. 512

(E.D.Pa. 1982), *aff'd*, 707 F.2d 1402 (3d Cir. 1983); *Gilinsky v. Columbia University*, 488 F.Supp. 1309 (1980), *aff'd*, 652 F.2d 53 (2d Cir. 1981); *Greene v. Johns Hopkins University*, 469 F.Supp. 187 (D.Md. 1979); *Stewart v. New York University*, 430 F.Supp. 1305 (S.D.N.Y. 1976) and *Lorentzen v. Boston College*, 440 F.Supp. 464 (D.Mass. 1977), *aff'd*, 577 F.2d 720 (1st Cir. 1981), *cert. denied*, 440 U.S. 924 (1979).

None of the above-listed private universities was state-related,[3] or had a special statutory relationship,[4] as here, to the state in which it was located.

The Universities are in error when they claim a conflict between the decisions in those cases and the decision of the Court of Appeals here because there is a substantial factual difference between purely private institutions which receive state funding or are merely incorporated under state law and state related universities which bear the name and imprimatur of state designated instrumentalities.

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[3] Pennsylvania students at the state-related universities receive the benefit of reduced tuition and fees because the Commonwealth may set tuition and fee schedules for Pennsylvania students in the annual appropriation act, Pa. Stat. Ann. Tit. 24, §2510-6 and §2510-206.

[4] One third of the University's trustees are selected by the Commonwealth, Pa. Stat. Ann. Tit. 24, §2510-4(d) and §2510-204(b). The Chancellor of the University must file annually a report of all University activities "instructional, administrative and financial" with the Board of Trustees who are obligated to submit the report to the Governor and members of the General Assembly of Pennsylvania. Pa. Stat. Ann. Tit. 24, §2510-10 and §2510-210.

2. **Cases Involving Other Statutory Schemes.**

The decision of the Court of Appeals for the Third Circuit properly considered the specific statutory scheme before it and did not, as claimed by the Universities, "transform all the decisions of entities whose governmental relationship is set forth by statute into government action." (Petition p. 9). The decision of the Court of Appeals was limited to the facts before it and did not establish a legal principle which would render any entity created by statute as a state actor for purposes of §1983.

This Court has consistently recognized the fact based nature of the state action analysis to be applied by the lower courts. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961) and *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939 (1982).

There is a clear *factual* difference between the Pennsylvania statutes which designated the Universities as "state-related" and as "instrumentalities" of the state, Pa. Stat. Ann. Tit. 24, §2510-2, §2510-202 and the federal statutory schemes cited by the Universities. The Universities are simply wrong when they rely on two federal statutory schemes which are completely unrelated to the *state* educational scheme considered by the Court of Appeals here and claim that applying the same rationale "federal action would be present in all decisions of the Communications Satellite Corporation or the National Rail Passenger Corporation." (Petition p. 9). The Communications Satellite System Act created:

> "a communications satellite corporation for profit which will not be an agency or establishment of the United States Government." Pub.L. 87-624, Title III, §301, Aug. 31, 1962, 76 Stat. 423.

Similarly in the National Rail Passenger Service Act, 1970, Congress created a "for profit corporation" which was expressly not "an agency or establishment of the United States, Pub.L. 95-421 §11, Oct. 5, 1978, 92 Stat. 928, Pub.L. 97-35, Title XI, §1188(a), Aug. 13, 1981, 95 Stat. 699.

The law to be applied to state statutory schemes has been established by decisions in this Court. The application of that law to different statutory schemes and in different factual settings obviously differs from case to case. Here the law of this Court was correctly applied. Moreover, the application of this Court's well settled legal principles to the plethora of different factual circumstances where state action is alleged is more appropriately the endeavor of a Court of Appeals.

3. Cases Discussing Whether The State Derived Profits From The Challenged Private Activity.

The Universities argue that three Courts of Appeals have limited the symbiotic relationship analysis set forth in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) to situations where the state financially benefitted from the challenged activity, *Hicks v. Southern Maryland Health Systems Agency*, 737 F.2d 399, 402 (4th Cir. 1984) (private non-profit health services agency); *Gomez v. North Dakota Rural Development Corp.*, 704 F.2d 1056, 1059 (8th Cir. 1983) (private non-profit public services organization); and *Gerena v. Puerto Rico Legal Services, Inc.*, 697 F.2d 447, 451 (1st Cir. 1983) (private non-profit legal services corporation) (Petition p. 17). These cases merely follow *Blum v. Yaretsky*, 457 U.S. 991 (1982) and hold that government funding and regulation are not sufficient in

and of themselves to render the conduct of private entities state action. See, *e.g.*, *Gomez v. North Dakota Rural Development Corp.* where the Court stated:

> "[A]part from its interest in seeing that a federal grant is actually used for its intended purpose, the government has no vested interest in the success or even the continued existence of any particular community agency." *Id.* at 1059.

While it is the nature, quality and duration of the commitment undertaken by the state on behalf of the private entity rather than whether the undertaking is profitable or costly which determines whether their joint enterprise is subject to constitutional limitations, the Court of Appeals here did find that by designating the Universities as State-related, the Commonwealth actually spent less (*i.e.*, it profited from the relationship) than it would have spent had it constructed new schools:

> "As the existing state educational institutions were insufficient to satisfy the public demand, and because the creation of new state universities would have been extremely expensive, the decision was made to incorporate established, but financially ailing private institutions into the Commonwealth system of higher education. The state thus was able to satisfy the educational needs of its citizens at a cost considerably lower than would have been entailed by the creation of wholly new institutions." 742 F.2d at 101, n. 9.

Therefore, although profitability is not a prerequisite for a symbiotic relationship, it is apparent that the state here realized a financial benefit[5] from the incorporation of

[5] Besides requiring annual appropriations to the Universities, Pa. Stat. Ann. Tit. 24, §2510-7 and §2510-207, the statutes entitle the Universities to benefit from all Commonwealth programs for capital development, Pa. Stat. Ann. Tit. 24, §2510-8 and §2510-208 and create a state tax exemption for income derived from bonds issued by the Universities and loans secured by their mortgages, Pa. Stat. Ann. Tit. 24, §2510-9 and §2510-209.

the Universities into the State-related higher education system, just as in *Burton* the State and the Eagle Coffee Shop "conferred mutual benefits on each other because of their location." 742 F.2d at 101.

There is no conflict between the Court of Appeals here and other Courts of Appeals.

4. Cases Involving State Subsidy And Regulation.

The Universities claim a conflict between the Court of Appeals decision and the holdings in *Loh-Seng Yo v. Cibola General Hospital*, 706 F.2d 306 (10th Cir. 1983) and *Arlosoroff v. National Collegiate Athletic Association*, 746 F.2d 1019 (4th Cir. 1984) (Petition p. 18). Both of those decisions stand for the proposition that subsidy and regulation do not make private conduct state action. That principle was also recognized by the Court of Appeals in this case when it stated:

> "Temple and Pitt are not merely 'private contractors performing services for the government,' *Rendell-Baker*, 457 U.S. at 843, 102 S.Ct. at 2772; they not only receive funding and are subject to routine state regulations, but are instrumentalities of the state, both in name and in fact." 742 F.2d at 103.

This Court has established legal standards for determining whether or not state action exists in a particular factual setting. The Court of Appeals for the Third Circuit articulated and applied this Court's legal standards consistent with the precedents in this Court and the decisions of the other Courts of Appeals.

Conclusion

For all of the reasons stated above certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 14th day of March, 1985, true and exact copies of the foregoing Respondents' Brief In Opposition were served by placing in the mail, postage prepaid, first class mail, addressed to:

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